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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DARRYL SMALL and RAYMOND PATEE,  
individually, and on behalf of all others similarly  
situated,

Plaintiffs,

v.

MULTICARE HEALTH SYSTEM D/B/A  
MULTICARE,

Defendant.

NO. 3:24-cv-05552-LK

**DEFENDANT MULTICARE HEALTH  
SYSTEM'S MOTION TO DISMISS  
PLAINTIFFS' AMENDED COMPLAINT  
PURSUANT TO FEDERAL RULES OF  
CIVIL PROCEDURE 12(b)(1) & 12(b)(6)**

**NOTE ON MOTION CALENDAR:  
JANUARY 21, 2025**

**ORAL ARGUMENT REQUESTED**

DEFENDANT'S MOTION TO  
DISMISS PLAINTIFFS' AMENDED  
COMPLAINT PURSUANT TO FRCP  
12(b)(1) and 12(b)(6)  
Case No. 3:24-cv-05552-LK

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## INTRODUCTION

Defendant Multicare Health (“Multicare”) respectfully moves this Court for an order dismissing Plaintiff Darryl Small (“Small”) and Plaintiff Raymond Patee’s (“Patee”) Amended Complaint (collectively “Plaintiffs”) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As with Small’s original Complaint, Plaintiffs continue to seek recovery from MultiCare on the flawed theory MultiCare improperly disclosed its patient’s personal health information (“PHI”) and personally identifiable information (“PII”) (collectively, “Sensitive Information”) to Meta Platforms, Inc. d/b/a Meta (“Facebook”) and/or Google LLC d/b/a Google (“Google”) through pixels (the “Tracking Pixel” or “Pixel(s)”) overtly disclosed and at use on MultiCare’s Online Platforms. Plaintiffs attempt to ride on the coat tails of the explosion of national pixel usage class action lawsuits by alleging nothing more than hypothetical acts and theoretical, rather than concrete, harms Plaintiffs allege resulted from their *completely voluntarily* access and use of MultiCare’s *public facing* website—as available to them as it was to any other internet user. Fundamentally fatal to Plaintiffs’ Complaint, a close examination of *facts*, rather than the *conclusions*, alleged in that Complaint makes clear Plaintiffs’ “case” is not about Sensitive Information at all, much less about personally identifiable Sensitive Information.

Plaintiffs' Amended Complaint fails because Plaintiffs do not sufficiently allege: (1) any actual injury suffered as a result of the MultiCare's alleged use of the Pixels; (2) what specific Sensitive Information was allegedly transferred, and how it was connected to Plaintiffs individually; (3) it was *in fact* actually transferred; and (4) it was being shared in some harmful way to the public at large. Rather than pleading actual facts, the Amended Complaint is replete with conclusory allegations about Facebook and Google advertisements—speculating they had something to do with Plaintiffs' browsing history on MultiCare's public facing website, despite not alleging any related facts specific to actual interactions with that website.

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As asserted in Multicare’s initial motion to dismiss (ECF No. 14), Plaintiffs’ Amended Complaint should be reviewed in light of this Court’s holding in *Nienaber, et al v. Overlake Hosp. Med. Ctr.*, in which this Court dismissed nearly identical allegations and causes of action because plaintiffs had failed to state valid claims. *See Neinaber, et al v. Overlake Hospital Med. Ctr.*, 2024 WL 2133709 (W.D. Wash. May 13, 2024) (dismissing pixel website claims against Washington healthcare provider finding Plaintiff had not plead sufficient and necessary elements of various common law and statutory causes of action—highlighting the lack of sufficient damages pled and the voluntary nature of Plaintiff’s conduct as barring Plaintiff’s claims); *Beagle v. Amazon, Inc.*, 2024 WL 4028290 (W.D. Wash. September 4, 2024) (dismissing Washington Consumer Protection claim and invasion of privacy claim arising out of website pixel use). Federal courts across the country have routinely dismissed similar cases, and this Court should continue its history of dismissing these unsubstantiated pixel lawsuits by doing so in this case. *See e.g., Smith v. Facebook, Inc.*, 745 F. App’x 8, 9 (9th Cir. 2018). (“Information available on publicly accessible websites stands in stark contrast to the personally identifiable patient records and medical histories protected by these statutes— information that unequivocally provides a window into an individual’s personal medical history.”); *Kurowski v. Rush Sys. for Health*, 2023 WL 4707184, at \*4 (N.D. Ill. July 24, 2023); *Cousin v. Sharp Healthcare*, 2023 WL 4484441, at \*3 (S.D. Cal. July 12, 2023). Indeed, Plaintiffs here have neither standing to bring their claims, nor have they sufficiently alleged any actionable claim.

## **BACKGROUND**

In their Amended Complaint, Plaintiffs admit they voluntarily visited MultiCare’s public-facing website that provides free information about MultiCare’s facilities and services, as alleged throughout Plaintiffs’ Complaint.<sup>1</sup> Generally, Plaintiffs allege they voluntarily

<sup>1</sup> Plaintiffs' attempts to create the illusion MultiCare somehow failed to maintain the confidentiality of doctor-patient information in this Complaint, however, *none* of Plaintiffs' allegations actually involve Sensitive Information shared while seeking medical treatment.

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1 interacted with MultiCare’s website “to search for a doctor, learn more about their conditions  
 2 and treatments, access medical records and test results, pay medical bills, and manage  
 3 appointments.” ECF No. 16, ¶ 6. New to the Amended Complaint, Plaintiff Small discusses  
 4 specific conditions he suffers from, and general browsing activities on MultiCare’s public  
 5 website. Specifically, Plaintiff Small alleges he suffers from attention deficit/hyperactivity  
 6 disorder (“ADHD”) and gastroesophageal reflux disease (“GERD”) and submitted messages to  
 7 MultiCare regarding prescriptions for same. *Id.* ¶¶ 334-335. Small also alleges generally  
 8 receiving his limited treatment for an infection, shoulder surgery, and that he has paid medical  
 9 bills via the website. *Id.* ¶¶ 331-376. Plaintiff Patee alleges vaguely that he “sought care” from  
 10 MultiCare for bladder and prostate health. *Id.* ¶ 357. Plaintiff Patee’s specific allegations  
 11 regarding interactions with MultiCare’s website are limited to messaging with MultiCare  
 12 regarding prescriptions. *Id.* Importantly, Plaintiff Patee does not allege he has treated for these  
 13 conditions at MultiCare, but merely that he interacted with the public facing website. Neither  
 14 Plaintiffs specifically allege specific Sensitive Information, via URL or otherwise, actually  
 15 collected or transmitted.

16 Despite Plaintiffs’ attempts, Plaintiffs’ Amended Complaint *does not allege with any*  
 17 *particularity* how their voluntary website usage was connected to their specific conditions,  
 18 treatment or prescriptions. *See e.g., id.* ¶¶ 347, 369. While the Amended Complaint alleges  
 19 Plaintiffs received targeted ads pertaining to prescriptions and Plaintiff Small’s shoulder which  
 20 are somehow related to their interactions with MultiCare’s website. Plaintiffs still do not specify  
 21 the *what, when or how* of specific Sensitive Information entered into the MultiCare website  
 22 could lead to these advertisements. Instead, they allege only generally and speculatively Google  
 23 and/or Meta could “reasonably *infer . . .* that a specific patient was being treated for a specific  
 24 type of medical condition . . .” based upon the allegedly disclosed information. *Id.* ¶ 20.  
 25 Plaintiffs’ inadequate and, at best, purely speculative allegations regarding *actual website*

1 *interaction* are insufficient to establish the causes of action pled in the Amended Complaint.

2 **ARGUMENT**

3 **I. PLAINTIFFS CANNOT ALLEGE THE INJURY-IN-FACT NECESSARY  
4 TO ESTABLISH STANDING**

5 Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for Article III  
6 standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). A motion to dismiss for lack of  
7 subject matter jurisdiction can either attack the sufficiency of the pleadings on their face (a  
8 “facial attack”) or present affidavits or other evidence that contest the truth of the allegations in  
9 the pleadings (a “factual attack”). *Sullivan v. Ferguson*, 636 F. Supp. 3d 1276, 1283 (W.D.  
10 Wash. 2022) (citing *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)).

11 To have standing, plaintiffs must show: (1) an injury in fact; (2) traceable to the  
12 defendant; and (3) redressable by judicial relief. *Lujan*, 504 U.S. at 560. Plaintiffs need “standing  
13 for each claim that they press and for each form of relief that they seek.” *TransUnion LLC v.  
14 Ramirez*, 141 S. Ct. 2190, 2208 (2021). In putative class actions, each named plaintiff must  
15 demonstrate “they personally have been injured, not that injury has been suffered by other,  
16 unidentified members of the class.” *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Further, adequate  
17 injury in fact is “concrete, particularized, and actual or imminent.” *Transunion*, 141 S.Ct. at  
18 2203; *Doe v. Microsoft Corporation*, 2023 WL 8780879 at \*3 (W.D. Wash Dec. 19, 2023). It  
19 must be “real,” rather than “abstract.” *Id.* (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340  
20 (2016)). Indeed, concreteness is essential: “[n]o concrete harm, no standing.” *TransUnion*, 141  
21 S. Ct. at 2200. When concreteness exists it, “ensure[s] that the alleged injury is not too  
22 speculative.” *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). An injury is imminent  
23 only where the threat of future harm is “certainly impending;” and the mere possibility of a  
24 future injury is not sufficient to confer standing. *Id.*

25 Here, Plaintiffs have not identified any concrete, particularized harm sufficient to confer  
26

1 standing. *See e.g. In re BPS Direct, LLC*, 2023 WL 8458245, at \*13 (E.D. Pa. Dec. 5, 2023)  
 2 (finding that Plaintiff in a pixel case did not have standing); *see also Roper v. Rise Interactive*  
 3 *Media & Analytics, LLC*, 2023 WL 7410641, at \*4 (N.D. Ill. Nov. 9, 2023) (only finding  
 4 standing where Plaintiff identified with particularity sensitive information allegedly stolen in  
 5 the course of a data breach); *Baysal v. Midvale Indem. Co.*, 78 F.4th 976, 978 (7th Cir. 2023)  
 6 (finding no standing where Plaintiff inflicted “harm on themselves based on their fears of  
 7 hypothetical future harm that is not certainly impending” and reiterating that, “worry and anxiety  
 8 are not the kind of concrete injury essential to standing”).

9 Plaintiffs’ conclusory “injury” allegations in the form of speculative “monetary  
 10 damages” (which are never quantified) and loss of privacy are insufficient to constitute the  
 11 injury-in-fact necessary to establish standing. Nothing about “targeted ads” constitutes an actual  
 12 injury-in-fact; and even if it was, Plaintiffs’ failure to specifically allege exactly what  
 13 information was entered into MultiCare’s online platform, or when it occurred, make it  
 14 impossible to establish any ads that existed were “traceable” to their interactions with  
 15 MultiCare’s website.<sup>2</sup> Accordingly, as Plaintiffs’ Amended Complaint is nothing more than  
 16 vague allegations regarding non-concrete “damages” resulting from non-specific limited  
 17 interactions with MultiCare’s website, Plaintiffs lack standing and their Amended Complaint  
 18 should be dismissed with prejudice.

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21           <sup>2</sup> Even if this was enough to establish standing, it certainly is not sufficient to establish the “cognizable  
 22 damages” element of Plaintiffs claims and meriting dismissal pursuant to Fed. R. Civ. Pro. 12(b)(6). *See e.g. T.D. v. Piedmont Healthcare, Inc.*, 2024 WL 3972984, at \*3 (N.D. Ga. Aug. 28, 2024) (In analogous  
 23 pixel tracking cases, “No facts are alleged that would explain how receiving targeted advertisements . . . would plausibly cause any of the Plaintiffs to suffer . . . damages. This is not a case where the Plaintiffs’ personal information was stolen by criminal hackers with malicious intent. The Plaintiffs received targeted advertisements because they are Facebook users and have Facebook IDs. The Court finds the Plaintiffs’ damages theories untenable.”).

1           **II. PLAINTIFFS' COMPLAINT DOES NOT SUFFICIENTLY ESTABLISH ANY  
2 CLAIMS UPON WHICH RELIEF CAN BE GRANTED**

3           Federal Rule of Civil Procedure 12(b)(6) provides for dismissal if a complaint fails to  
4 state a claim upon which relief can be granted. To survive a motion to dismiss, the complaint  
5 “must contain sufficient ‘well-pleaded, nonconclusory factual allegation[s],’ accepted as true,  
6 to state ‘a plausible claim for relief.’” *Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 604 (9<sup>th</sup>  
7 Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679-80 (2009)). Factual allegations must be  
8 enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550  
9 U.S. 544, 555 (2007). Dismissal is appropriate when the complaint lacks a “cognizable legal  
10 theory” or sufficient factual allegations to “support a cognizable legal theory.” *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 652-53 (9th Cir. 2019). Applying the foregoing  
11 standards, Plaintiffs have failed to state a claim.

12           **A. This Court Should Adopt the Rationale of *Nienaber* and Dismiss Plaintiffs' Claims**

13           This matter is almost identical in facts and causes of action to *Nienaber*, 2024 WL  
14 2133709, which this Court dismissed in May 2024. Accordingly, this Court should adopt the  
15 rationale from *Nienaber* in dismissing this action.

16           Factually, like Plaintiffs here, plaintiff in *Nienaber* “allege[d] that she used [d]efendant's  
17 [w]ebsite [and patient portal] ‘numerous times’ since 2019 to ‘request and schedule  
18 appointments, communicate with healthcare professionals, complete medical forms, and request  
19 and review healthcare and billing records.’” *Nienaber*, 2024 WL 2133709, at \*1. In her  
20 Complaint, the plaintiff claimed Defendant Overlake Hospital installed the Meta Pixel, Google  
21 Tag Manager and other tracking tools on its website, which in turn, resulted in an “unauthorized  
22 transmission and disclosure of [the plaintiff’s] information.” *Id.* As a result, the plaintiff alleged  
23 various conclusory and speculative harms including, *inter alia*, the loss of value of her personal  
24 data and heightened risks of identity theft and fraud. *Id.* at 8-9, 13-14.

25           Further, the plaintiff in the *Nienaber* action alleged a number of the same causes of action

1 as Plaintiffs do here including negligence, invasion of privacy, breach of implied contract, unjust  
 2 enrichment, violations of the Electronic Communications Privacy Act (“ECPA”), and violations  
 3 of the Washington Consumer Protection Act (“WCPA”). As detailed further herein, this Court  
 4 dismissed *all* the foregoing claims. Specifically, this Court held that the plaintiff’s failure to  
 5 plead specific damages, including economic damages, was fatal to her claims. *Id.* at 8-9, 13-14,  
 6 17. Additionally, the Court held that the plaintiff’s invasion of privacy, ECPA, and WCPA  
 7 claims all failed because Overlake never, in sum, intercepted or intervened Nienaber’s  
 8 “solitude” to capture her personal data, but that Nienaber’s claims arose from her own voluntary  
 9 interactions with Overlake’s public facing website. *Id.* at 10, 15. Notably, this Court adopted its  
 10 holdings in *Nienaber* in multiple instances this year. In *Beagle v. Amazon*, 2024 WL 4028290,  
 11 at \*4-5, this Court again dismissed claims arising out of pixel usage on a public website,  
 12 specifically dismissing the plaintiff’s invasion of privacy and WCPA claims, citing *Nienaber* as  
 13 the basis for its decision, and reasoning plaintiff’s voluntary interactions with defendant’s  
 14 website and speculative damages were not enough to state a cognizable claim. *Id.* In addition,  
 15 in November this Court dismissed plaintiffs’ common law causes of action in a pixel tracking  
 16 class action. *Castillo v. Costco Wholesale Corp.*, 2024 WL 4785136 at \*14-16 (W.D. Wash.,  
 17 Nov. 13, 2024) (dismissing breach of implied contract, conversion, and invasion of privacy  
 18 causes of action)<sup>3</sup>.

19 As detailed herein, the similarities between *Nienaber* and this action are indisputable.  
 20 Plaintiffs in this matter do not allege economic or actual harms, but merely possible and  
 21 intangible harms such as “(i) invasion of privacy; (ii) lost time and opportunity costs associated  
 22 with attempting to mitigate the actual consequences of the disclosure of his Private Information;  
 23 (iii) loss of benefit of the bargain; (iv) diminution of value of the Private Information;  
 24

25 <sup>3</sup> While Multicare acknowledges the *Costco* court did allow some of the same claims Plaintiffs allege  
 26 here to survive beyond the pleading stage – Multicare contends those claims are deficient in this case for  
 the reasons laid out herein.

(v) statutory damages and (vi) the continued and ongoing risk to his Private Information.” ECF No. 16, ¶¶ 351, 373. Further, Plaintiffs here admit they voluntarily used MultiCare’s website “to make appointments with medical specialists, exchange messages with his providers, fill out questionnaires requested by his providers, request referrals for specific health issues, refill prescriptions, update medication information, and check medical test results.” *Id.*, ¶¶ 333, 357. As this Court held similar claims based on almost identical facts and resulting conclusory non-tangible harms failed to state claims upon which relief can be granted in both *Nienaber* and *Beagle*, it should rule similarly here. As such, MultiCare respectfully requests this Court adopt those decisions’ rationales in dismissing Plaintiffs’ claims in their entirety.

**B. Plaintiffs Cannot State an ECPA Claim Because the Complaint Does Not Establish the Existence of Sensitive Information Transferred or Intercepted (Count I)**

A claim under the ECPA (18 U.S.C. § 2510, *et seq.*) “requires a showing that the defendant (1) intentionally (2) intercepted, endeavored to intercept or procured another person to intercept or endeavor to intercept (3) the contents of (4) an electronic communication, (5) using a device.” *See In re Facebook Internet Tracking Litig.*, 263 F. Supp. 3d 836, 844 (N.D. Cal. 2017) (internal citations and quotation marks omitted).

Here, Plaintiffs cannot establish Multicare has unlawfully “intercepted” any communication. The ECPA is a one-party consent statute. 18 U.S.C. § 2511(2)(d) (The ECPA does not make it unlawful for someone to “intercept … electronic communication where such person is a party to the communication.”); *see also In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 275 (3d Cir. 2016) (discussing “one-party consent language in the Wiretap Act”). Stated differently, a party to a communication cannot unlawfully “intercept” a communication directed to it and cannot be held liable for “eavesdropping” upon itself. 18 U.S.C. § 2511(2)(d); *In re Nickelodeon*, 827 F.3d at 275 (dismissing ECPA claim because defendant “was either a party to all communications with the plaintiff’s computers or was permitted to communicate with the plaintiff’s computers by Viacom, who was itself a party to all such communications.”);

1       see also *In re Google Cookie Placement Consumer Priv. Litig.*, 806 F.3d 125, 142–143 (3rd Cir.  
 2       2015) (dismissing ECPA claim because tracking cookies placed by advertising providers made  
 3       the advertiser the intended recipient of the electronic transmission); *In re Facebook Privacy*  
 4       *Litig.*, 791 F. Supp. 2d at 713 (same); *Kurowski*, 659 F. Supp.3d at 936 (same). As discussed  
 5       above, this Court has recently dismissed ECPA claims in analogous pixel cases—joining other  
 6       courts around the country to have arrived at the same conclusion.

7              In the *Kurowski* case, which the *Nienaber* court relies, the Northern District of Illinois  
 8       held users of a healthcare provider’s websites failed to state a claim under the ECPA because  
 9       the healthcare provider was the intended recipient of the communication and, therefore, could  
 10       not have intercepted the communication allegedly occurring on the healthcare providers’  
 11       website. *Id.* at 938 (“The Court concludes that Rush [the healthcare provider]—and not  
 12       Facebook, Google, or Bidtellect—was the intended recipient of the allegedly intercepted  
 13       communications here. Rush is therefore a party to those communications and cannot be liable  
 14       under the Wiretap Act for its alleged interception of them, if such an interception even  
 15       occurred.”); see also *Allen*, 2023 WL 5486240 at \*4 (same ruling). Like *Nienaber*, the statutory  
 16       exception where a “communication is intercepted for the purpose of committing any criminal or  
 17       tortious act in violation of the Constitution or laws of the United States or of any State” does not  
 18       apply to the instant action. See, *Nienaber*, 2024 WL 2133709, at \*15 (holding ECPA exception  
 19       does not apply because “Plaintiff fails to plead a tortious or criminal use of the acquired  
 20       communications, separate from the recording, interception, or transmission”).

21              Here, MultiCare did not intercept Plaintiffs’ information; much less transmit Plaintiffs’  
 22       Sensitive Information to commit a crime or tortious act. Plaintiffs’ claims are centered on their  
 23       voluntary browsing activities and interactions with MultiCare’s website. Plaintiffs do not plead  
 24       tortious or criminal use, but merely that the data was used to target ads to themselves. See e.g. *In*  
 25       *re Google Cookie Placement*, 806 F.3d at 145 (“As the plaintiffs plead no tortious or criminal use

1 of the acquired internet histories, § 2511(d) is not inapplicable on the basis of the criminal-tortious  
 2 purpose exception.”) (emphasis in original). Accordingly, Plaintiffs’ ECPA claim should be  
 3 dismissed with prejudice.

4 **C. Plaintiffs’ Various Breach of Contract and Related Claims Cannot Survive a  
 Motion to Dismiss**

5 **1. Plaintiffs Have Not Stated a Claim for Breach of Express or Implied Contract  
 (Counts II & IV)**

6 Under Washington law, to establish any claim for breach of express or implied contract:  
 7 (1) the parties entered into an enforceable contract; (2) the Defendant breached the contract as  
 8 claimed by the Plaintiffs; and (3) the Plaintiffs were damaged because of the Defendant’s breach.  
 9 *Nw. Indep. Forest Mfrs v. Dep’t of Labor & Indus.*, 78 Wash. App. 707, 712 (1995). Plaintiffs  
 10 fail to sufficiently plead any of these three elements.

11 *First*, Plaintiffs have not alleged existence of a valid contract. Rather than identifying an  
 12 actual valid express contract, instead Plaintiffs plead only in a conclusory fashion they and other  
 13 members of the putative class “entered into valid and enforceable express contracts or were  
 14 third-party beneficiaries of valid and enforceable express contracts.” ECF No. 16, ¶ 446. While  
 15 Plaintiffs contend MultiCare’s Privacy Notice is the express contract by which the parties were  
 16 bound to “maintain the privacy” of Plaintiffs’ Sensitive Information; as a matter of law,  
 17 MultiCare’s Privacy Notice is *not* considered a bargained for contract, but a healthcare  
 18 provider’s compliance with HIPAA’s federal mandates. *See, e.g., See Neinaber*, 2024 WL  
 19 2133709, at \*13; *Brush v. Miami Beach Healthcare Grp. Ltd.*, 238 F. Supp. 3d 1359, 1367–69  
 20 (S.D. Fla. 2017); *J.R. v. Walgreens Boots All., Inc.*, No. 2:19-CV-00446-DCN, 2020 WL  
 21 3620025, at \*14 (D.S.C. July 2, 2020).<sup>4</sup>

22 Further, under Washington law, there two classes of implied contracts: implied in fact

23  
 24  
 25  
 26 <sup>4</sup> Further, it is not possible for a breach of an implied contract premised on an express contract, *i.e.*,  
 MultiCare’s Privacy Policy. *See, e.g., In re VTech Data Breach Litigation*, No. 15 CV 10889, 2018 WL  
 1863953, at \*3 (N.D. Ill. Apr. 18, 2018) (“In law and common sense, there cannot be an express and  
 implied contract for the same thing, existing at the same time.”)(citations omitted).

1 and implied by law (quasi-contracts). *Chandler v. Wash. Toll Bridge Auth.*, 17 Wash.2d 591,  
 2 600, 137 P.2d 97, 101 (1943). Relevant here, a contract implied in fact “is an agreement  
 3 depending for its existence on some act or conduct of the party sought to be charged and arising  
 4 by implication from circumstances which, according to common understanding, show a mutual  
 5 intention on the part of the parties to contract with each other.” *Id.* (*citing Johnson v. Nasi*, 309  
 6 P.2d 380, 383 (1957)). “[A] trial court may ‘deduce mutual assent from the circumstances,  
 7 whereby the court infers a contract based on a course of dealings between the parties or a  
 8 common understanding within a particular commercial setting.’” *Nienaber*, 2024 WL 2133709,  
 9 at \*11 (internal quotations omitted).

10 Here, like *Nienaber*, Plaintiffs fail to establish existence of a contract implied in fact  
 11 arising from a mutual agreement expressed not in words, but through actions. While Plaintiffs  
 12 allege in a conclusory fashion that such a contract exists, they do not plead *any facts* necessary  
 13 to support this element. Even in the Amended Complaint, Plaintiffs allege no facts regarding the  
 14 parties’ *conduct* that could demonstrate mutual intent to agree upon express or implied terms.  
 15 Contrary to Plaintiffs’ allegations that MultiCare’s privacy policy created an implied contract,  
 16 this Court in *Neinaber* states, while such policies *may form* the *terms* of an implied contract,  
 17 they do not alone serve as an enforceable contract without a separate “meeting of the minds”  
 18 between the parties. *See Neinaber*, 2024 WL 2133709, at \*13; *Doe v. Regents*, 672 F.Supp.3d  
 19 813, 821 (N.D. Cal. May 8, 2023). No such factual allegations of a separate meeting of the mind  
 20 exists here. As the *Nienaber* court found, “[t]he services [giving rise to the contract] must be  
 21 rendered under such circumstances as to indicate that the person rendering them expected to be  
 22 paid therefor and that the recipient expected, or should have expected, to pay for them.” 2024  
 23 WL 2133709, at \*11.

24 Here, Plaintiffs fail to plead how, why, or how much they paid for anything other than  
 25 medical services. Such allegations are necessary to establish the consideration received by  
 26

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1 MultiCare or mutual intent between Plaintiffs and MultiCare, both essential for the existence of  
 2 an implied contract. *Id.*; *see also Guy*, 2023 WL 4637318, at \*5 (dismissing Plaintiffs' breach  
 3 of implied contract claim based on insufficient allegations of mutual intent). In reality, there are  
 4 no facts alleged in the Amended Complaint to justify Plaintiffs' unsubstantiated claim Plaintiffs  
 5 paid for "data privacy" pursuant to an express or implied contract between the parties.

6 *Second*, as there is no valid contract, there is no corresponding "breach." To satisfy the  
 7 breach element of breach of contract, plaintiffs must be able to point to a specific contract or  
 8 provision of a contract that has been breached. *Elliott Bay Seafoods v. Port of Seattle*, 124 Wash.  
 9 App. 5, 12, 98 P.3d 491, 494 (2004). Plaintiffs have not plead such allegations, other than  
 10 conclusory claims a contract existed and MultiCare breached its Privacy Notice, which as  
 11 discussed, *supra*, is not legally cognizable. ECF No. 16, ¶¶ 446, 452.

12 *Finally*, notwithstanding the fact Plaintiffs failed to establish a valid contract exists or  
 13 breach thereof, Plaintiffs cannot establish cognizable damages as discussed in Section II(A)  
 14 above. Further, Courts throughout the Ninth Circuit have dismissed similar causes of action in  
 15 matters where alleged "damages" were based upon diminution in value of a plaintiff's personal  
 16 data and where it is undisputed that a plaintiff did not pay defendant for its services. *See e.g.*,  
 17 *Doe v. Meta Platforms, Inc.*, 2023 WL 5837443, at \*15 (N.D. Cal. Sept. 7, 2023)); *see also*  
 18 *Saeedy v. Microsoft Corp.*, 2023 WL 8828852, at \*6 (W.D. Wash. Dec. 21, 2023); *Nienaber*,  
 19 2024 WL 2133709, at \*13.

20 Accordingly, these claims cannot survive.

21 **2. Plaintiffs Have Not Stated a Claim for Breach of the Implied Duty of Good Faith  
 22 and Fair Dealing (Count III)**

23 As no contract, express or implied, exists between Plaintiffs and MultiCare, there can be  
 24 no violation of this covenant. Nevertheless, even if a contract had existed, Plaintiffs' claims *still*  
 25 are not sufficient to establish a breach of the covenant here because there are no allegations in  
 26 the Amended Complaint that give rise to such a breach. *See Microsoft Corp. v. Motorola, Inc.*,

1 963 F. Supp. 2d 1176, 1184 (W.D. Wash. 2013) (embracing the Restatement of Torts in the  
 2 context of the covenant of good faith and fair dealing). As discussed in the Restatement of Torts  
 3 Section 205, such claims exists only in situations such as: (1) where a party evades the spirit of  
 4 a bargain; (2) where a party willfully renders imperfect performance; (3) where a party interferes  
 5 with or fails to cooperate in the other party's performance; (4) where a party abuses discretion  
 6 granted under the contract; or (5) where a party performs the contract without diligence. None  
 7 of these scenarios are implicated by Plaintiffs' claims. Specifically, MultiCare could not have  
 8 *interfered* with Plaintiffs, as Plaintiffs admit to voluntarily providing MultiCare with their  
 9 Sensitive Information, and no allegations in the Amended Complaint indicate an abuse of  
 10 discretion or discreet lack of diligence expressly provided for by the non-existent contract.

11 As such, the Court must dismiss this cause of action.

12 **D. Plaintiffs Have Not Stated a Cognizable Claim for Breach of Fiduciary Duty (Count  
 13 VI)**

14 MultiCare has not breached any fiduciary duty to Plaintiffs, because no such duty exists  
 15 in fact or law. To state a claim for breach of fiduciary duty, Plaintiffs must show “(1) existence  
 16 of a duty, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately  
 17 caused the injury.” *Priv. Client Fiduciary Corp. v. Pham Singh Chopra*, 2023 WL 2372917, at  
 18 \*6 (W.D. Wash. Mar. 6, 2023) (internal quotations omitted). Pursuant to Washington law, a  
 19 fiduciary duty is derived from special relationship “of trust and confidence.” *Favors v. Matzke*,  
 20 53 Wn. App. 789, 796 (1989). Specifically, the special relationship exists where “one party is  
 21 relying upon the superior specialized knowledge and experience of the other...where a seller has  
 22 knowledge of a material fact not easily discoverable by the buyer... and where there exists a  
 23 statutory duty to disclose....” *Id.*

24 Here, Plaintiffs allege the “patient-physician” relationship gave rise to a special  
 25 relationship creating a fiduciary duty to maintain confidentiality and secure Plaintiffs’ Sensitive  
 26 Information. ECF No. 16, ¶ 524. This theory is flawed. *First*, there are no allegations in the

1 Amended Complaint of specific sensitive Protected Health Information provided in the course  
 2 of the doctor/patient relationship at issue in this case. *Second*, it is illogical to argue any duty of  
 3 care, much less the high duty of care created by the fiduciary relationship, exists regarding  
 4 information Plaintiffs voluntarily input into MultiCare's public-facing website, as accessible to  
 5 Plaintiffs as it is to any internet user in the world. *Third*, Plaintiffs never allege MultiCare is the  
 6 *custodian* of Plaintiffs' data, but rather only the information was transmitted to outside third  
 7 parties in the course of Plaintiffs' willful use of the website. *Fourth*, while Plaintiffs cite to  
 8 various state and federal statutes which they claim MultiCare has violated, none of these confer  
 9 a statutory fiduciary duty and therefore, are not relevant here. *Id.* ¶ 527. Notably, Washington  
 10 Courts have never found a special relationship between a patient and a healthcare company in  
 11 this context, and this court should not create the existence of such a relationship in this case.

12       **E. Plaintiffs Cannot State a Claim for Unjust Enrichment (Count VII)**

13       To state a claim for unjust enrichment, Plaintiffs must plead sufficient facts showing:  
 14 (1) MultiCare received a benefit, (2) at Plaintiffs' expense, and (3) the circumstances make it  
 15 unjust for MultiCare to retain the benefit without payment. *See Young v. Young*, 164 Wash.2d  
 16 477, 191 P.3d 1258, 1262 (2008). The fact a party profits at another's expense is insufficient to  
 17 trigger liability for unjust enrichment; rather, the enrichment must be unjust as between the  
 18 parties to a transaction. *Cox v. O'Brien*, 150 Wn. App. 24, 37 (2009).

19       The Washington District Court has dismissed unjust enrichment claims in similar  
 20 contexts. In *In re MCG Health Data Sec. Issue Litig.*, this Court held that Plaintiffs' allegations  
 21 lacking evidence of any specific benefit conferred on defendant were insufficient to establish  
 22 unjust enrichment in a data breach. 2023 WL 3057428, at \*6. The court reasoned that Plaintiffs  
 23 did not allege they entered into a transaction with the Defendant healthcare system or that they  
 24 conferred a benefit to the Defendant. *See also M.L. v. Craigslist, Inc.*, 2020 WL 6434845, \*16  
 25 (W.D. Wash. April 17, 2020) (dismissing unjust enrichment claim where plaintiff did not enter

1 into a transaction and lack of any concrete benefit retained by the defendant that it would be  
 2 unjust for the defendant to retain.); *see also Nienaber*, 2024 WL 2133709, at \*14 (dismissing  
 3 unjust enrichment claim as Plaintiff failed to adequately plead either a concrete detriment or the  
 4 circumstances made it unjust for the defendant to retain any benefit conferred).

5 Here, Plaintiffs' allegations are insufficient to establish a claim for unjust enrichment.  
 6 Similar to the Plaintiffs in *MCG Health* and *Nienaber*, Plaintiffs do not allege facts showing  
 7 they conferred a benefit to MultiCare or how it would be unjust for MultiCare to retain what  
 8 payments it did receive. Any expense Plaintiffs incurred were payments for healthcare services,  
 9 not data privacy. *See e.g., Irwin v. Jimmy John's Franchise, LLC*, 175 F. Sup. 3d 1064, 1072  
 10 (N.D. Ill. 2016) ("[The Plaintiff] paid for food products. She did not pay for a side order of data  
 11 security and protection; it was merely incidental to her food purchase, as is the liability to sit at  
 12 a table to eat her food, or to use Jimmy John's restroom."); *see also Gordon v. Chipotle Mexican*  
 13 *Grill, Inc.*, 344 F. Supp. 3d 1231, 1249 (D. Colo. 2018) ("Plaintiffs paid for burritos; Plaintiffs  
 14 received burritos.").

15 Accordingly, the Court should dismiss Plaintiffs' unjust enrichment claim.

16 **F. Plaintiffs Fail to State a Claim for Negligence (Count V)**

17 Under Washington law, to state a claim for negligence, Plaintiffs must establish duty,  
 18 breach, injury and proximate causation. *Lowman v. Wilbur*, 178 Wn. 2d 165, 170 (Wash. 2013).  
 19 While the Amended Complaint baldly asserts the elements of negligence, it lacks factual  
 20 allegations to support the elements. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
 21 (emphasizing insufficiency of "naked assertions devoid of further factual enhancement")  
 22 (internal quotations and alterations omitted). As detailed below, Plaintiffs fail to establish duty,  
 23 breach, and damages. As such, the Court should dismiss Plaintiffs' negligence claim.

24 **1. MultiCare Has No Duty to Safeguard Browsing Data under Washington Law,  
 25 HIPAA or the FTCA**

26 *First*, there is no recognized duty under Washington law for safeguarding online

1 browsing information and Plaintiffs cannot imply one exists through simply using the phrase  
 2 “special relationship” without any facts to support such allegations. ECF No. 16, ¶ 509. This  
 3 generic unsupported allegation could be applied so broadly as to be illogical and is insufficient  
 4 to establish duty. As discussed in Section II(D), there is no duty to protect non-sensitive generic  
 5 information that Plaintiffs voluntary entered in MultiCare’s public-facing website. Indeed,  
 6 several Washington courts have dismissed negligence causes of action in the data class action  
 7 context based on just such generic pleadings. *See Buckley v. Santander Consumer USA, Inc.*,  
 8 2018 WL 1532671, at \*5-6 (W.D. Wash. Mar. 29, 2018) (dismissing negligence claim based on  
 9 a theory of failure to maintain adequate data security because “Washington courts have not  
 10 recognized a ‘special relationship’ between consumers and data custodians”); *Veridian Credit*  
 11 *Union v. Eddie Bauer, LLC*, 295 F.Supp.3d 1140, 1157-58 (dismissing negligence claim based  
 12 on data breach because allegations insufficient to establish a special relationship).<sup>5</sup>

13 *Second*, Plaintiffs cannot invoke a statutory duty onto MultiCare pursuant to the Health  
 14 Insurance Portability and Accountability Act (“HIPAA”) and the Federal Trade Commission  
 15 Act (“FTCA”). ECF No. 16, ¶¶ 506-522. It is black letter law that both HIPAA’s and FTCA’s  
 16 statutory framework do not support a private cause of action, and as such, it is illogical to allege  
 17 these statutes create a duty. *See, e.g. Guy v. Convergent Outsourcing, Inc.*, 2023 WL 4637318,  
 18 at \*4 (W.D. Wash. Jul. 20, 2023) (dismissing negligence cause of action in data breach case and  
 19 finding section 5 of the FTC Act does not create a duty); *Towles v. Dzurenda*, 735 Fed. Appx.  
 20 440, 440 (9th Cir. 2018) (finding the district court properly dismissed claim alleging HIPAA  
 21 violations because “there is no private right of action under the statute.”); *Garmon v. Cty. of*  
 22 *L.A.*, 828 F.3d 837, 847 (9th Cir. 2016) (holding there is no private right of action pursuant to  
 23 HIPAA); *In re MCG Health Data Sec. Issue Litig.*, 2023 WL 3057428, at \*3 (“To the extent  
 24 that HIPAA universally has been held not to authorize a private right of action, to permit HIPAA

1 regulations to define per se the duty and liability for breach is no less than a private action to  
 2 enforce HIPAA, which is precluded.”). Therefore, MultiCare has no statutory duty to  
 3 “reasonably protect” Plaintiffs’ Sensitive Information pursuant to statute or otherwise.<sup>6</sup>

#### 4 **2. As MultiCare Had No Duty, MultiCare Did Not Breach a Duty**

5 Assuming, *arguendo*, the Court found a duty here, Plaintiffs fail to plead facts sufficient  
 6 to establish a breach. Plaintiffs merely plead baseless and conclusory allegations about  
 7 “unauthorized disclosure of Plaintiffs’ and Class members’ Private Information,” implying,  
 8 without support, MultiCare shared patients’ Sensitive Information with third parties. In  
 9 *Nienaber*, the Court granted plaintiff’s motion to dismiss the negligence claim, holding  
 10 “Plaintiff has made hypothetical allegations of information-sharing, Plaintiff must plead facts  
 11 showing (or supporting the inference) *her* PHI was shared with Defendant and by Defendant to  
 12 third parties.” *Nienaber*, 2024 WL 2133709, at \*8.

13 Here too, Plaintiffs insufficiently alleged what PHI was shared with Defendant, and then  
 14 allegedly disclosed to some outside third-party. Indeed, Plaintiffs’ vague allegations about  
 15 ADHD, GERD, shoulder issues and “exchang[ing] messages... about prescription refills” do  
 16 not establish the alleged inappropriate sharing of specific PHI. ECF No.16, ¶ 334, 358. Simply  
 17 stating they received an advertisement for medications and treatment after vaguely interacting  
 18 with MultiCare’s website do not sufficiently establish the existence of any breach.

#### 19 **3. Plaintiffs Have Failed to Allege Damages**

20 As detailed throughout this motion and discussed in more depth in Section II(A) above,  
 21 Plaintiffs’ Amended Complaint is fatally deficient as it wholly fails to allege cognizable  
 22 damages, which are required for their negligence claim to survive. Even if Plaintiffs had  
 23

---

24     <sup>6</sup> The Defendant recognizes that the *Nienaber* court recognized that such a duty existed in the Pixel use  
 25 context. Unlike in *Nienaber*, however, Plaintiffs do not allege any violation of the Health Care  
 26 Information Act in this case. Nonetheless, even if such a duty exists, the claim is still deficient for the  
 additional reasons addressed herein and recognized by the *Nienaber* court in dismissing the negligence  
 cause of action in that case.

1 established any cognizable duty or breach, which they cannot, their lack of damages invalidates  
 2 these claims. “The mere danger of future harm, unaccompanied by present damage, will not  
 3 support a negligence action.” *Lovell v. P.F. Chang’s China Bistro, Inc.*, 2015 WL 4940371, at  
 4 \*2 (W.D. Wash. Mar. 27, 2015) (internal quotations omitted); *see also Krottner v. Starbucks*  
 5 *Corp.*, 406 App’x 129, 131 (9th Cir. 2010) (“Under Washington law, [a]ctual loss or damage is  
 6 an essential element in the formulation” of a negligence claim). Here, Plaintiffs do not allege  
 7 any cognizable tangible present damages they suffered. Instead, they plead only speculative  
 8 potential risks of future harm, self-inflicted damages, or generic “inconveniences” instead of  
 9 actual damages. As *Lovell* explains, “the fear that something might happen in the future is  
 10 simply too speculative an injury to give rise to a present cause of action.” *See* 2015 WL 4940371,  
 11 at \*2. Indeed, as in *Nienaber*, Plaintiffs here do not allege facts establishing any heightened risk  
 12 of future identity theft, loss of privacy with regards to *highly sensitive information*, loss of time  
 13 or risk of embarrassment. *Nienaber*, 2024 WL 2133709, at \*8. Given the additional lack of any  
 14 economic damages pled, Plaintiffs have not established any cognizable damages.

15 Accordingly, as Plaintiffs wholly fail to establish any of the elements of negligence, this  
 16 claim must be dismissed.

#### 17      **G. Plaintiffs’ Invasion of Privacy Claim Must Be Dismissed (Count VIII)**

18      As confirmed in *Nienaber*, *Beagle*, and *Castillo*, Plaintiffs’ invasion of privacy cause of  
 19 action cannot survive a motion to dismiss.

20      There can be no intrusion upon seclusion here because the alleged intrusion, if any, was  
 21 carried out by third parties, Meta or Google, not MultiCare. *Poore-Rando*, 2017 WL 5756871,  
 22 at \*2 (“[A]n actor commits an intentional intrusion only if he believes, or is substantially certain,  
 23 that he lacks the necessary legal or personal permission to commit the intrusive act.”) (*quoting*  
 24 *O’Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989) (alteration in original)). To  
 25 prevail on an intrusion on seclusion claim, a plaintiff must prove that the defendant (1)  
 26

1 deliberately intruded; (2) into the plaintiff's solitude, seclusion, or private affairs; (3) in a manner  
 2 that would be highly offensive to a reasonable person. *Youker v. Douglas Cty.*, 178 Wn. App.  
 3 793, 797 (2014). The defendant's intrusion must substantially interfere with a plaintiff's  
 4 seclusion in a highly offensive or objectionable to a reasonable person. *Id.* "Invasion of privacy  
 5 by intrusion consists of a deliberate intrusion, physical or otherwise, into a person's solitude,  
 6 seclusion, or private affairs." *Fisher*, 106 P.3d at 840.

7 In dismissing virtually identical intrusion upon seclusion claims, this Court in *Nienaber*  
 8 adopted the Northern District of Illinois rationale in the *Kurowski* case. The *Kurowski* Court  
 9 dismissed a plaintiff's intrusion of seclusion claim, holding that the defendant healthcare center  
 10 did not intrude into its patient's solitude or seclusion, finding that the patients *willfully* provided  
 11 the Defendant with Sensitive Information. *Id.* at 9; *see also Nienaber*, 2024 WL 2133709, at \*23  
 12 ("Because the plaintiff voluntarily shared her information with the defendant, there was no  
 13 *intrusion* upon plaintiff's solitude, seclusion, or private affairs by defendant). Similarly here,  
 14 Plaintiffs admit to voluntarily providing MultiCare with Sensitive Information in the very first  
 15 paragraphs of the Complaint. ECF No. 16, ¶¶ 5-6. Accordingly, Plaintiffs' invasion of privacy  
 16 claim premised on an intrusion upon seclusion theory is flawed.

17 Also flawed is Plaintiffs' invasion of privacy claim premised on a public disclosure of  
 18 private information. "To prevail on a public disclosure of private facts claim, a plaintiff must  
 19 prove that the defendant (1) intentionally disclosed private facts; (2) that were not of legitimate  
 20 concern to the public; (3) which disclosure would be highly offensive to a reasonable person."  
 21 *Armijo v. Yakima*, 2012 WL 2576624, \*2 (E.D. Wash. July 3, 2012). "[P]ublicity for the  
 22 purposes of [a public disclosure of private facts claim] means communication to the public at  
 23 large so that the matter is substantially certain to become public knowledge." *Fisher*, 106 P.2d  
 24 at 840–41. Recently, in the Pixel context, this Court expressly rejected the exact public  
 25 disclosure invasion of privacy theory put forth by plaintiffs in this case. *See Beagle*, 2024 WL  
 26

DEFENDANT'S MOTION TO  
 DISMISS PURSUANT TO FRCP  
 12(b)(1) and 12(b)(6) - 19  
 Case No. 3:24-cv-05552-LK

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1 4028290, at \*5 (“This is not a case about Amazon’s disclosure of plaintiffs’ PII to the public at  
 2 large. To the contrary . . . it is a case about Amazon’s alleged disclosures of PII within the  
 3 Amazon ecosystem and to certain third parties to communicate with Amazon users about  
 4 promotional offers and target them with ads.”); *citing Nienaber*, 2024 WL 2133709, at \*10  
 5 (“Plaintiff does not allege that the information shared by defendant will become available to the  
 6 public at large; to the contrary, plaintiff alleges that the information is shared with Facebook  
 7 and, in turn, is being used by Facebook to target plaintiff herself.”); *see also Castillo*, 2024 WL  
 8 4785136, at \*14.

9 Based on the foregoing, this Court should dismiss Plaintiffs’ invasion of privacy claims.

10 **H. Plaintiffs have Not Stated a Claim Pursuant to the Washington Consumer  
 11 Protection Act (Count IX)**

12 Plaintiffs’ failure to allege any cognizable damages also proves fatal to the Washington  
 13 Consumer Protection Act (“CPA”) claim. ECF No. 16, ¶¶ 560-570. “To prevail in a private CPA  
 14 claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade  
 15 or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and  
 16 (5) causation.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 37 (2009) (citing  
 17 *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 784, 719 P.2d 531  
 18 (1986)). Either an unfair or a deceptive act can be the basis for a CPA claim. *Klem v. Wash. Mut.*  
 19 *Bank*, 176 Wash.2d 771, 787 (2013); *Nienaber* 2024 WL 2133709, at \*17. Plaintiffs must,  
 20 however, allege a sufficient injury. *Guy*, 2023 WL 4637318, at \*8. Further, failure to satisfy  
 21 even one element is fatal to a CPA claim. *Id.* at 539–40.

22 *First*, as this Court held in *Beagle*, Plaintiffs’ allegations that MultiCare provided its  
 23 Sensitive Information to non-parties Meta and Google does not constitute “an unfair or deceptive  
 24 act or practice” under RCW 19.86.020. An act or practice “is unfair [if it] causes or is likely to  
 25 cause substantial injury to consumers which is not reasonably avoidable by consumers  
 26 themselves and not outweighed by countervailing benefits.” *Domain Name Comm’n Ltd. v.*

1      *Domain Tools, LLC*, 449 F. Supp. 3d 1024, 1031 (W.D. Wash. 2020). An unfair practice offends  
 2      public policy or is “unethical, oppressive, or unscrupulous.” *Mellon v. Reg'l Tr. Servs. Corp.*,  
 3      334 P.3d 1120, 1126 (Wash. Ct. App. 2014).

4      In *Beagle*, the Court held plaintiff’s failure to allege that Amazon disclosed its personal  
 5      information precluded its ability to plead an unfair business practice. *Beagle*, 2024 WL 4028290  
 6      at \*4. Importantly, the *Beagle* court recognized that even if Amazon’s actions were considered  
 7      “unfair” pursuant to the statute, plaintiff’s allegations he read privacy policy and still *voluntarily*  
 8      interacted with the website provided that the injury was avoidable. *Id.* Similarly here, as detailed  
 9      in Section II(B), Plaintiffs fail to allege that MultiCare transmitted their Sensitive Information  
 10     to Meta or Google. Further, even if Plaintiffs sufficiently alleged transmittal, which they do not,  
 11     it is not disputed that Plaintiffs voluntarily interacted with and provided their information to  
 12     MultiCare, and as such, any injury was avoidable.

13     *Second*, Plaintiffs’ CPA claim fails because Plaintiffs do not plausibly allege any impact  
 14     on the public interest. *See Umouyo v. Bank of Am., N.A.*, 2023 U.S. Dist. LEXIS 17291, at \*16  
 15     (W.D. Wash. Feb. 1, 2023). “The Legislature intended that even a private plaintiff should be  
 16     required to show that the acts complained of affect the public interest.” *Hangman Ridge*  
 17     *Training Stables, Inc.*, 719 P.2d at 537. The Washington Supreme Court identifies these factors  
 18     as relevant to this inquiry:

- 19        (1) Were the alleged acts committed in the course of defendant's  
 20        business? (2) Are the acts part of a pattern or generalized course of  
 21        conduct? (3) Were repeated acts committed prior to the act involving  
 22        plaintiff? (4) Is there a real and substantial potential for repetition of  
 23        defendant's conduct after the act involving plaintiff? (5) If the act  
 24        complained of involved a single transaction, were many consumers  
 25        affected or likely to be affected by it?

26     *Id.* at 538. Plaintiffs’ Amended Complaint includes no factual allegations relevant to these  
 27     considerations, but instead generically alleges that MultiCare’s “conduct is injurious to the  
 28     public interest.”

DEFENDANT’S MOTION TO  
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1 public interest because it violates RCW 19.86.020... injured Plaintiff and the Washington  
 2 Subclass members and had the capacity to injure persons.” ECF No. 16, ¶ 567. These conclusory  
 3 allegations “are insufficient as they fail to plead facts demonstrating any reasonable impact to  
 4 members of the public.” *Umouyo*, 2023 U.S. Dist. LEXIS 17291, at \*17.

5 *Third*, the CPA requires “but for” causation, which Plaintiffs do not satisfy. CPA  
 6 requires “[a] causal link . . . between the unfair or deceptive acts and the injury suffered by  
 7 plaintiff.” *Hangman Ridge*, 719 P.2d at 539. “That link must establish that the alleged injury  
 8 would not have occurred ‘but for’ the defendant’s unlawful acts.” *Patrick v. Wells Fargo Bank*,  
 9 N.A., 385 P.3d 165, 171 (Wash. Ct. App. 2016) (internal quotations omitted). As above,  
 10 Plaintiffs here fail to allege any unfair or deceptive act by MultiCare which was the proximate  
 11 cause of Plaintiffs’ injuries.

12 *Lastly*, Plaintiffs do not sufficiently allege injury to business or property under the CPA.  
 13 The CPA requires each Plaintiff to plead and prove “injury to plaintiff in his or her business or  
 14 property.” RCW 19.86.090; *Hangman Ridge*, 719 P.2d at 533-35. “Personal injuries, as opposed  
 15 to injuries to ‘business or property,’ are not compensable and do not satisfy the injury  
 16 requirement.” *Panag*, 204 P.3d at 899. “Thus, “damages for mental distress, embarrassment,  
 17 and inconvenience are not recoverable under the CPA.” *Id.* Further, “an invasion of privacy is a  
 18 ‘personal’ injury, rather than a ‘business or property’ injury[.]” *Gragg v. Orange Cab Co.*, 942  
 19 F. Supp. 2d 1111, 1119 (W.D. Wash. 2013).

20 Plaintiffs do not plead “injury to business or property” under any theory. They broadly  
 21 allege only “personal” injuries, which are categorically excluded from what is recoverable under  
 22 the CPA. ECF No. 16, ¶ 384. *See Ambach v. French*, 216 P.3d 405, 408 (Wash.  
 23 2009); *Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903, at \*4 (W.D. Wash. Oct.  
 24 23, 2013) (“distress or concern caused by the possibility of foreclosure” not recoverable under  
 25 CPA); *McCrorey v. Fed. Nat'l Mortg. Ass'n*, 2013 WL 681208, at \*4 (W.D. Wash. Feb. 25,  
 26

1 2013) (“[t]hreats of eviction” insufficient under CPA); *Gragg*, 942 F. Supp. 2d at  
 2 1119 (invasion of privacy, aggravation, and annoyance not cognizable).

3 Based on the foregoing, Plaintiffs’ Amended Complaint fails to plead CPA’s several  
 4 required elements, and as such, it must be dismissed.

5 **I. Plaintiffs Have Not Stated a Claim Pursuant to the Washington Revised Code § 7.70  
 6 and Counts I-IX are Preempted by this Claim (Count X)**

7 Chapter 7.70 RCW, known as the medical malpractice statute, governs “all civil actions  
 8 and causes of action, whether based on tort, contract, or otherwise, for damages for injury  
 9 occurring as a result of healthcare.” RCW 7.70.010. *Bozung v. MultiCare Health Sys.*, 31 Wash.  
 10 App. 2d 1017, review denied, 556 P.3d 1102 (Wash. 2024). “To recover damages for “injury  
 11 occurring *as the result of healthcare*,” a plaintiff must establish at least one of three propositions:  
 12 (1) injury resulted from the failure of a healthcare provider to follow the accepted standard of  
 13 care; (2) a healthcare provider promised the patient or his or her representative that the injury  
 14 suffered would not occur; or (3) injury resulted from healthcare to which the patient or their  
 15 representative did not consent. *Reagan v. Newton*, 7 Wash. App. 2d 781, 790, 436 P.3d 411, 416  
 16 (2019).

17 This claim is deficient for several reasons. *First*, Plaintiffs have not suffered an “injury”  
 18 as a result of MultiCare’s purported conduct. *See Section I. Second*, Plaintiffs have failed to  
 19 allege an express promise or obligation on behalf of MultiCare that was breached. *See Section*  
 20 *II(C)*. Finally, Plaintiffs admit to voluntarily using the MultiCare website and as such, cannot  
 21 contend that they were injured from their failure to consent because they did consent. Further,  
 22 this claim is based on the same factual predicate as their other claims. Accordingly, the  
 23 remaining causes of action they allege are preempted because “whenever an injury occurs as a  
 24

1 result of healthcare, the action for damages for that injury is governed exclusively by RCW  
 2 7.70" *Branom v. State*, 94 Wash. App. 964, 971, 974 P.2d 335, 339 (1999).<sup>7</sup>  
 3

4 **CONCLUSION**

5 WHEREFORE, MultiCare respectfully requests that this Court dismiss Plaintiffs'  
 6 Amended Complaint with prejudice and without leave to amend, and for all other relief deemed  
 7 necessary and appropriate.

8 **CERTIFICATION OF WORD COUNT**

9 I certify that this memorandum contains 7,999 words, in compliance with the Local Civil  
 10 Rules.

11 **CERTIFICATION OF CONFERRAL**

12 Pursuant to the Court's Standing Order for All Civil Cases, attorney for MultiCare  
 13 conferred with Plaintiffs' counsel on, Wednesday December 18, 2024, regarding this  
 14 Motion. The parties were unable to narrow the claims to be decided by the Court.

15 Respectfully submitted this 23rd day of December 2024.

16 GORDON REES SCULLY MANSUKHANI, LLP

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 26 <sup>7</sup> The fact that Plaintiffs have not sufficiently alleged the elements of this claim are immaterial to the fact  
 that section 7.70 provides Plaintiffs their sole recourse for the subject matter of this lawsuit.